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No. 04-278

# In the Supreme Court of the United States

TOWN OF CASTLE ROCK, COLORADO, PETITIONER

*v.*

JESSICA GONZALES, INDIVIDUALLY AND AS NEXT BEST FRIEND OF HER DECEASED MINOR CHILDREN, REBECCA GONZALES, KATHERYN GONZALES, AND LESLIE GONZALES

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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## QUESTION PRESENTED

Whether the Tenth Circuit erred in holding that the Town of Castle Rock is liable under 42 U.S.C. 1983 for violating the procedural due process rights of respondent, who was issued a restraining order under state law during divorce proceedings, because police failed to provide adequate procedures before they declined to arrest her estranged husband for violating the terms of the order.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

## INTEREST OF THE UNITED STATES

This case concerns the liability of officials under the Due Process Clause of the Fourteenth Amendment for failing to protect individuals from private violence. Because of its role in the investigation and prosecution of federal crimes and in enforcing other statutory provisions, the United States has a substantial interest in the development of due process law, principles of public liability for private wrongs, and qualified immunity. The same due process principles that apply to state and local officials under the Fourteenth Amendment also apply to the federal government under the Due Process Clause of the Fifth Amendment. *Paul* v. *Davis*, 424 U.S. 693, 702 n.3 (1976).

## STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in relevant part, "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. Relevant statutory pro-

visions are set forth in an appendix to this brief. See App., *infra*, 1a-8a.

## STATEMENT

1. On May 21, 1999, during divorce proceedings, respondent obtained a temporary restraining order (TRO) against her estranged husband, Simon Gonzales, from the state district court in Douglas County, Colorado. Pet. App. 125a. See generally Colo. Rev. Stat. § 14-10-108 (2004) (App., *infra*, 1a). The TRO, which was completed using a standard printed form, was directed to Mr. Gonzales and stated that "[y]ou may not molest or disturb the peace of the party or of any child," Pet. App. 89a, "[y]ou may not transfer, encumber, conceal, or in any way dispose of any property" except under specified circumstances, *ibid.*, and "[y]ou shall not enter * * * the home of the other party * * * and shall remain at least 100 yards away from [it]." *Id.* at 90a. Below the signature and seal of the issuing judge, the TRO form noted that there were "IMPORTANT NOTICES FOR RESTRAINED PARTIES AND LAW ENFORCEMENT OFFICIALS ON REVERSE." *Ibid.* The printed notices on the back of the form included a warning to the restrained party that "YOU MAY BE ARRESTED WITHOUT NOTICE IF A LAW ENFORCEMENT OFFICER HAS PROBABLE CAUSE TO BELIEVE THAT YOU HAVE KNOWINGLY VIOLATED THIS ORDER." *Id.* at 91a. The "NOTICE TO LAW ENFORCEMENT OFFICIALS" stated, in relevant part, "YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED OR ATTEMPTED TO VIOLATE ANY PRO-



VISION OF THIS ORDER" and had notice of the order. *Id.* at 91a-92a.

Mr. Gonzales was served with the TRO on June 4, 1999. Pet. App. 125a. The same day, by stipulation of the parties, the state court "made the TRO permanent," but modified the terms. *Ibid.* The permanent order granted Mr. Gonzales "parenting time" with the children on alternate weekends, during two weeks in the summer, and permitted "a mid-week dinner visit with the minor children" to be arranged upon "reasonable notice." C.A. Reh'g App. 30; Pet. App. 125a-126a. The order permitted him "to pick up the minor children from the home of [respondent] for parenting time purposes." C.A. Reh'g App. 30; Pet. App. 5a.

2. Shortly after 5 p.m. on Tuesday, June 22, 1999, without giving notice to respondent, Mr. Gonzales picked up the three girls while they were playing outside the home they shared with respondent. Pet. App. 126a. When respondent learned they were missing, she suspected that they had been taken by her husband, who, the complaint alleges, "had a history of suicidal threats and erratic behavior." *Ibid.* At approximately 7:30 p.m., respondent telephoned the Castle Rock Police Department for assistance, and two officers came to her home. *Ibid.* Respondent showed them a copy of the TRO and asked that it be enforced and that the three children be returned to her immediately. The officers stated that there "was nothing they could do about the TRO" and suggested that respondent contact the police again if the children had not returned by 10 p.m. *Ibid.*

At approximately 8:30 p.m., respondent spoke to Mr. Gonzales by telephone, and he told her that he had taken the children to an amusement park in Denver. Pet. App. 126a. Respondent contacted one of the officers who had responded to her earlier call and requested that someone check the amusement park for Mr. Gonzales and that an all-points bulletin be issued for him. The officer allegedly refused to do

so, and told respondent to wait until 10 p.m. to see if the children returned. *Id.* at 126a-127a. At approximately 10 p.m., respondent called the police and told the dispatcher that the children had not returned. She was told to call back at midnight. *Id.* at 127a.

At midnight, respondent called the police department and told the dispatcher that the children had not returned. Respondent then went to Mr. Gonzales' apartment and determined that he was not there. Respondent called the police from the apartment complex and was told to wait there for an officer to arrive. When no officer had arrived by 12:50 a.m., respondent went to the police station, where an officer took an incident report but, according to the complaint, did nothing further. Pet. App. 127a.

At approximately 3:20 a.m., Mr. Gonzales arrived at the police station and began shooting at the station with a handgun. Pet. App. 127a. The police returned fire and killed him. The police found the bodies of the three girls in his truck; Mr. Gonzales apparently killed them earlier that evening. *Ibid.*

3. Respondent filed suit in federal district court against the Town of Castle Rock (Town) and several police officers under 42 U.S.C. 1983. See Pet. App. 124a-130a. Respondent claimed that the Town and the officers "knowingly failed to perform their duties to [respondent] and the three children to protect them from, arrest or restrain Simon Gonzales, and such failure constituted a denial of the due process rights of [respondent] and the three children." *Id.* at 128a. Respondent alleged that the police department "maintains an official policy or custom that recklessly disregards a person's rights to police protection with respect to restraining orders, and provides for or tolerates the non-enforcement of restraining orders." *Id.* at 129a.

The district court dismissed the complaint for failure to state a claim. See Fed. R. Civ. P. 12(b)(6). Although the



complaint did not separately allege substantive and procedural due process claims, the court analyzed both theories in turn. The district court noted that *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189, 196 (1989), held that the Due Process Clause does not generally impose on governments a duty to protect individuals from private violence, and that such a duty arises only when the government has a "special relationship" with individuals, or when the government itself creates the danger that causes the injury. Pet. App. 118a. The court found that neither of those circumstances was present here. *Id.* at 119a-120a. The court rejected respondent's claim that Colorado Revised Statutes Section 18-6-803.5(3), which provides in part that an officer "shall arrest" a restrained person when probable cause exists that he has violated a restraining order, see App., *infra*, 3a, gave respondent a property interest in enforcement of the restraining order and that the Town had deprived her of that interest without due process. The court concluded that the provision did not create a property interest because its language was not "mandatory" as police had discretion in determining whether probable cause existed. Pet. App. 121a-122a.

4. A panel of the court of appeals affirmed the dismissal of the substantive due process claim, but reversed the dismissal of the procedural due process claim. Pet. App. 99a-112a. The panel held that the language of Section 18-6-803.5(3) "creates a mandatory duty to arrest when probable cause is present," giving the holder of a restraining order "a legitimate claim of entitlement to the protection provided by arrest" (Pet. App. 110a) that was subject to due process protection. *Id.* at 111a.

5. The court of appeals granted rehearing en banc on the procedural due process issue. Pet. App. 97a-98a. By a 6-5 vote, the en banc court again reversed the dismissal of respondent's procedural due process claim, see *id.* at 1a-94a,

although the full court adopted a different rationale than the panel decision.

a. The majority held that the language on the back of the restraining order, coupled with the "similar" (Pet. App. 18a) language contained in Section 18-6-803.5, gave respondent a "property interest in the enforcement of the terms of her restraining order" (Pet. App. 12a) that entitled her to procedural due process before police could decline to arrest Mr. Gonzales. *Id.* at 12a-29a. The majority emphasized that the notices on the back of the form stated in "mandatory" (*id.* at 20a) terms that officers "*shall* use every reasonable means to enforce" the order and "*shall* arrest * * * the restrained person" when there was probable cause to believe he had violated the order. *Id.* at 17a. Although acknowledging that "police officers may have some discretion in how they enforce a restraining order," *id.* at 23a, the court concluded that the order limited police discretion by "mandat[ing] the arrest of Mr. Gonzales under specified circumstances" (*i.e.*, when there was probable cause he had violated the order). *Id.* at 19a.

After considering the factors set forth in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976), see Pet. App. 38a, the majority concluded that the Due Process Clause requires police to follow a four-step process before declining to enforce a restraining order. Under that procedure, an officer must:

> determine whether a valid order exists, whether probable cause exists that the restrained party is violating the order, and whether probable cause exists that the restrained party has notice of the order. If, after completing these three basic steps, an officer finds the restraining order does not qualify for mandatory enforcement, the person claiming the right should be notified of the officer's decision and the reason for it.

*Id.* at 40a (citations omitted). The majority held that respondent's claim against the Town could proceed on the theory



that it had an established policy of not enforcing restraining orders because the police "did not consider [respondent's] request [for enforcement] in a timely fashion." *Id.* at 41a. Because the majority could not say that "a reasonable officer would have known that a restraining order, coupled with a statute mandating its enforcement, would create a constitutionally protected property interest," it held that the officers were entitled to qualified immunity. *Id.* at 42a-43a.

b. There were four dissenting opinions. Judge Kelly (joined by Chief Judge Tacha and Judge O'Brien) concluded that for respondent to have a valid due process claim, the property interest would have to arise from the language of Section 18-6-803.5 itself, because the supposedly mandatory language on which the majority relied was not contained in "the decretal paragraphs of the order," but in form notices that simply paraphrased the language of the statute (Pet. App. 45a & n.1), and the order did not bind police, who were "non-parties" to the divorce action. *Id.* at 45a. The statute, however, was not distinguishable from other state statutes providing that police "shall apprehend" offenders that had never been thought to create a property interest, see *id.* at 55a. Judge O'Brien (joined by Chief Judge Tacha and Judge Kelly) dissented on similar grounds, *id.* at 67a-88a, concluding that the "shall arrest" language of Section 18-6-803.5 "cannot overcome the pervasive understanding * * * that law enforcement is not liable for failing to protect citizens from the deliberate actions of third parties." *Id.* at 85a.

Judge McConnell (joined by Chief Judge Tacha and Judges Kelly and O'Brien) concluded that respondent's argument that the officers had "arbitrarily and for no legitimate reason failed to enforce the protective order" was "a quintessentially substantive claim" that was barred by *DeShaney*, Pet. App. 60a, and that the majority had improperly recast the claim as procedural. *Id.* at 58a-67a. Judge Hartz (joined by Chief Judge Tacha and Judge Kelly) wrote that the

purportedly mandatory language of Section 18-6-803.5 was best read as "a hortatory expression by the legislature" that preserved traditional police enforcement discretion, Pet. App. 92a-93a, and concluded that respondent had been afforded due process because she was given the opportunity to present to police evidence that the restraining order had been violated and to argue that arrest was the appropriate response. *Id.* at 94a.

## SUMMARY OF ARGUMENT

The court of appeals majority erred by holding that the notice on the back of the TRO form, together with Colorado Revised Statutes Section 18-6-803.5, so restricted the police officers' discretion that it "mandated the arrest of Mr. Gonzales" (Pet. App. 19a) and gave respondent "a protected property interest in the enforcement of the terms of her restraining order." *Id.* at 11a-12a. The language on which the majority relied was not in the restraining order itself, but in a printed notice on the back of the TRO form, below the judge's signature. That notice imposed no duty on police, who were not a party to the litigation, but simply paraphrased the relevant statute solely for informational purposes. Nor does Section 18-6-803.5 create any mandatory duty. Although the statute provides that police "shall arrest" suspected violators of restraining orders, that must be read in light of the discretion implicit in the more general requirement that police use only "reasonable" means to enforce the statute, and in light of the historical understanding that arrest statutes, which commonly are drafted in mandatory terms, preserve police discretion to make enforcement decisions based on current resources and needs.

Even if Section 18-6-803.5 imposed a duty of enforcement on police, it does not follow that respondent had "a legitimate claim of entitlement" such that she "could reasonably expect to enforce the[] [statute] against the [police] officials." *Kentucky Dep't of Corr.* v. *Thompson*, 490 U.S. 454, 460, 465



(1989). The enforcement provisions of the statute concern a subject—government enforcement decisions—that this Court has held to be presumptively beyond the scope of judicial review, see generally *Heckler* v. *Chaney*, 470 U.S. 821 (1985). In addition, this Court has recognized that private citizens lack a judicially cognizable interest in the prosecution of another person, see *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973). Accordingly, courts should recognize an entitlement to enforcement only when the legislature has clearly indicated that to be its intent. The language of Section 18-6-803.5 points to the opposite conclusion. Because the enforcement provisions of Section 18-6-803.5 do not even directly mention the protected party, and regulate the conduct of police with respect to the restrained party, they are best construed to provide procedural guides for police rather than to create rights in the holders of restraining orders. In addition, Section 18-6-803.5 does not afford the holders of restraining orders any right to a hearing or other remedial action that this Court has taken as evidence of recognition of a protected interest. Recognizing a property interest in the enforcement of restraining orders will disrupt law enforcement efforts because the risk of personal liability will force officials to give detailed consideration to even minor alleged violations in cases involving no risk of violence, even when it diverts resources from addressing more serious crimes or public emergencies.

Even if this Court were to recognize for the first time a property interest in police enforcement of criminal laws, police satisfy the requirements of due process when, as here, they permit the holder of the restraining order to present evidence of a violation of the order and argue that arrest is the proper response. The need for formal procedural protections before police decline immediate enforcement is undercut by the fact that the holder of a restraining order also can enforce its provisions through contempt proceedings, and

police can be asked to reconsider their decision when the need for immediate enforcement becomes more critical. The state has a significant countervailing interest in administrative simplicity. The procedures adopted by the court of appeals would not improve decisionmaking because the facts to be proved by the holder of a restraining order are rarely in dispute, and enforcement decisions often turn on the availability of police resources and police assessment of risk, neither of which would be affected by more elaborate procedural protections. Finally, the lack of historical precedent for affording citizens formal procedures before police decline to take enforcement action against third parties counsels against finding such a right here.

## ARGUMENT

### PETITIONER DID NOT DEPRIVE RESPONDENT OF A PROTECTED "PROPERTY INTEREST" WITHOUT DUE PROCESS OF LAW

By a narrow majority, the court of appeals concluded that respondent's restraining order, together with the language of Colorado Revised Statutes Section 18-6-803.5, so restricted the police officers' discretion upon a showing that "specific objective criteria" had been met (Pet. App. 28a) (*i.e.*, there was probable cause that the restrained party had violated the order), that it "mandated the arrest of Mr. Gonzales" (*id.* at 19a), and respondent thus "possessed a protected property interest in the enforcement of the terms of her restraining order." *Id.* at 11a-12a. That conclusion misapprehends the nature of the notices on the back of the TRO form; fails to consider the statutory language in textual and historical context; ignores a long tradition of judicial noninterference in executive enforcement decisions; and would disrupt legitimate police enforcement efforts and saddle municipalities with unprecedented and unwarranted liability. Even accepting the allegations of the complaint as true,



respondent has not stated a procedural due process claim under the Fourteenth Amendment.

At bottom, respondent advances the same complaint as the plaintiffs in *DeShaney* v. *Winnebago County Department of Social Services*, 489 U.S. 189 (1989)—that the State should have done more to prevent one citizen from inflicting grievous harm on another. But as this Court emphasized in *DeShaney*, the purpose of the Due Process Clause was "to protect the people from the State, not to ensure that the State protected them from each other." 489 U.S. at 196. Respondent and the court below identify two differences between this case and *DeShaney*: 1) respondent's claims, unlike those in *DeShaney*, are based on obligations imposed by court order and statute rather than arising from the Due Process Clause itself; and 2) her claims sound in procedural, rather than substantive, due process. Neither of those differences supports the finding of a constitutional violation here where none existed in *DeShaney*.

First, even a much clearer duty on the part of police to enforce a restraining order than is provided by Colorado law would not give rise to a due process violation. Even a statute that imposed on police an absolute duty to arrest in response to any claimed violation of a restraining order (putting to one side the restrained party's constitutional objections to such a statute) would not give rise to a due process violation in a case where police did not respond. Nothing in the Due Process Clause converts every failure of a State to perform a duty mandatory under a state statute into a federal constitutional violation. *E.g.*, *Snowden* v. *Hughes*, 321 U.S. 1, 11 (1944); *Youngberg* v. *Romeo*, 457 U.S. 307, 330 n.* (1982) (Burger, C.J., concurring in the judgment).

Second, respondent's effort to hold the Town accountable for the harm Simon Gonzales inflicted on respondent's daughters does not become viable by reconceptualizing it as a procedural due process claim. Respondent's effort to have

the courts impose on police a set of procedures for handling claims of restraining-order violations runs into two obstacles. First, it is difficult to square with the traditional rule that courts do not review executive enforcement decisions, *e.g.*, *Wayte* v. *United States*, 470 U.S. 598, 608 (1985), as well as the historical absence of constitutionally imposed procedural requirements for responding to citizen complaints. More fundamentally, respondent's real complaint is not with the procedures applied, but with the Town's failure to respond promptly to her complaints and prevent a tragedy. See Pet. App. 63a (McConnell, J., dissenting); see generally *Developments in the Law—Legal Responses to Domestic Violence*, 106 Harv. L. Rev. 1498, 1564 & n.92 (1993) ("to require *procedural* protections [for the enforcement of restraining orders] * * * would be pointless" because enforcement "does not depend on controvertible facts"; "[t]his is one way in which some claims now framed as procedural due process violations are really about substantive wrongs").

In the end, as in *DeShaney*, the real complaint is not a classic substantive due process claim that a certain law is beyond the legislature's power to enact, nor a classic procedural due process challenge to the sufficiency of the procedures provided by law, but a complaint that the government should have intervened to prevent a tragedy. As *DeShaney* makes clear, the courts have never recognized a constitutional claim of that type.

### A. Respondent Lacked A Protected Property Interest In Police Enforcement Of The Restraining Order

Because the "requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property," *Board of Regents* v. *Roth*, 408 U.S. 564, 569 (1972), the "first inquiry in every due process challenge is whether" the interest asserted by the plaintiff constitutes "a protected interest in 'property' or 'liberty'" within the meaning of the



Due Process Clause. *American Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 59 (1999). "[I]t is well-settled that only a limited range of interests fall within this provision." *Hewitt* v. *Helms*, 459 U.S. 460, 466 (1983). To qualify as a protected property interest, "the interest must rise to more than 'an abstract need or desire,' and must be based on more than 'a unilateral hope.' Rather, an individual claiming a protected interest must have a legitimate claim of entitlement to it." *Kentucky Dep't of Corr.* v. *Thompson*, 490 U.S. 454, 460 (1989) (quoting *Roth*, 408 U.S. at 577, and *Connecticut Bd. of Pardons* v. *Dumschat*, 452 U.S. 458, 465 (1981)).

#### 1. *The Language Of The Restraining Order Did Not Create A Property Interest In Police Enforcement*

The court of appeals held that the language of the restraining order was "so mandatory that it creates a right to rely on that language thereby creating an entitlement that could not be withdrawn without due process." Pet. App. 15a (quoting *Cosco* v. *Uphoff*, 195 F.3d 1221, 1223 (10th Cir. 1999) (per curiam), cert. denied, 531 U.S. 1081 (2001)). That conclusion was mistaken.

First, the language on which the court of appeals relied was not in the restraining order itself, but in a printed notice on the back of the form. The operative portion of the order —the section specifying what the court order commands—is directed at Mr. Gonzales alone, and begins "IT IS ORDERED THAT" and ends with the judge's signature and seal. See Pet. App. 89a-90a. While the face of the order, below the judge's signature, states "PLEASE NOTE: IMPORTANT NOTICES * * * ON REVERSE," Pet. App. 90a, nothing in the order incorporates those notices by reference or suggests they are included in the court's commands. Second, context indicates that that language was intended to serve a purely informational function. The language was explicitly denominated as a "NOTICE" and placed on the back of the form beneath the judge's signature, was ad-

dressed only to a nonparty to the litigation, cf. Colo. R. Civ. P. 65(d) (restraining order "is binding only upon the parties to the action"), and simply paraphrased relevant Colorado law. A directive to law enforcement officials is not included among the provisions that Colorado law explicitly authorizes a party requesting a restraining order to seek, see Colo. Rev. Stat. § 14-10-108(2) (2004), and Colorado law does not indicate that an officer's failure to enforce such an order is a "violation of a protection order." *Id.* § 18-6-803.5(1).

While the restraining order may have, as the majority concluded, "define[d] [respondent's] rights," Pet. App. 16a, "whatever substantive rights were declared or established by the court [were] only * * * in relation to her husband, the only other party to the litigation." *Id.* at 74a (O'Brien, J., dissenting). Whatever obligation police had to enforce the terms of the restraining order stemmed—as respondent claimed, see, *e.g.*, Resp. C.A. Reh'g Br. 9; Resp. C.A. Br. 9; Resp. to Mot. to Dismiss 5—not from the notice provisions, but from the language of Section 18-6-803.5 itself.

### 2. *Colorado Law Does Not Create A Property Interest In Police Enforcement Of A Restraining Order*

The court of appeals' conclusion also relied on the use of "mandatory" (Pet. App. 27a) language in Section 18-6-803.5. The court noted that that provision states that police "*shall* use every reasonable means to enforce a restraining order" and "*shall* arrest" when an officer has probable cause that the restrained person "has violated or attempted to violate" the order. Pet. App. 18a (emphasis added) (quoting Colo. Rev. Stat. § 18-6-803.5(3)). The court reasoned that "[t]he word 'shall' is mandatory, not precatory," *id.* at 27a, so that "once probable cause exists, any discretion the officer may have possessed in determining whether or how to enforce the restraining order is wholly extinguished." *Id.* at 22a.



### a. *Colorado Law Does Not Create A Mandatory Duty*

While the use of the word "shall" in a statute ordinarily suggests that action is mandatory, the context of Section 18-6-803.5 indicates that the police retain discretion in its enforcement. To begin with, the provision stating that police "shall arrest" a suspected violator must be read in the context of the more general command that immediately precedes it, which provides that police "shall use every *reasonable* means to enforce a protection order," Colo. Rev. Stat. § 18-6-803.5(3)(a) (2004) (emphasis added). That provision suggests that police may take only those actions that are reasonable under the circumstances, which necessarily requires the exercise of discretion. Cf. *City of Riverside* v. *Rivera*, 473 U.S. 1315, 1319 (1985) (Rehnquist, J., in chambers) (indicating that what is "'reasonable' * * * involves substantial elements of judgment and discretion"). Indeed, the notice provided to the restrained party on the back of the TRO form is consistent with the police officers' retention of discretion. See Pet. App. 91a ("YOU MAY BE ARRESTED" if police have probable cause that the order was violated). Consistent with this language and the statutory and historical context, no Colorado court has interpreted the arrest provision of Section 18-6-803.5 to be mandatory.

More fundamentally, the court of appeals' conclusion overlooks the unique context of the enforcement of criminal statutes. Although "[a]rrest statutes are commonly drafted in mandatory terms," Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 13.2(b), at 625 (2d ed. 1992), and "each and every state [has] long-standing statutes that, by their terms, seem to preclude nonenforcement by the police," 1 *ABA Standards for Criminal Justice* 1-4.5, commentary, at 1-124 (2d ed. 1980 & Supp. 1986), "it has been recognized that * * * [those statutes] clearly do not mean that a police officer may not lawfully decline to arrest." *Id.* at 1-125;

accord *Criminal Procedure*, *supra*, § 13.2(b), at 625. For a number of reasons, including the intentionally broad wording of criminal statutes and the provision of insufficient resources for their full enforcement, such statutes have long been construed to permit police to decline enforcement even when they have probable cause to believe there has been a violation. As this Court has long recognized, "many statutory requisitions intended for the guide of officers in the conduct of business devolved upon them . . . do not limit their power." *United States* v. *James Daniel Good Real Property*, 510 U.S. 43, 65 (1993) (quoting *French* v. *Edwards*, 80 U.S. (13 Wall.) 506, 511 (1872)); cf. *Brock* v. *Pierce County*, 476 U.S. 253, 256, 265 (1986) (holding that statutory provision stating that the Secretary of Labor "'shall' determine 'the truth of [an] allegation'" within 120 days was meant "to spur the Secretary to action, not to limit his authority"); *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 158-159 (2003). Courts should be reluctant to construe such language to constrain executive officers' traditional discretion to tailor enforcement decisions to current resources and community needs. See p. 18, *infra*.

Other provisions of Colorado law confirm that the language of Section 18-6-803.5 was not meant to impose an inflexible duty to arrest. Colorado law has long provided that the "chief of police, or any member of the police force *shall suppress* all riots, disturbances, and breaches of the peace, *shall apprehend* all disorderly persons in the city, * * * *shall pursue and arrest* any person fleeing from justice," and "*shall apprehend* any person in the act of committing any offense" and bring that person before a "judge * * * for examination and trial." Colo. Rev. Stat. § 31-4-112 (2003) (emphasis added); see *id.* § 139-3-15 (1953). We are unaware of any published decision of a Colorado court indicating that those provisions create a mandatory duty of enforcement. The case law suggests the contrary. The Colorado Supreme



Court has interpreted statutes providing that certain action "shall" be taken as "necessarily precatory" when context indicated the language was not meant to be binding. *Goebel* v. *Colorado Dep't of Insts.*, 764 P.2d 785, 802 (1988). In addition, that court repeatedly has emphasized that executive-branch officials have broad discretion over enforcement decisions.[1] Thus, Section 18-6-803.5 cannot be said to "mandate[] the outcome to be reached upon a finding that the relevant criteria have been met." *Thompson*, 490 U.S. at 462.

**b. *Colorado Law Does Not Support A Legitimate Claim Of Entitlement To Police Enforcement Of The Restraining Order***

Even if Section 18-6-803.5 were to impose on police a duty to arrest violators of restraining orders, it would not follow that respondent had "a legitimate claim of entitlement" to enforcement such that *she* "could reasonably expect to enforce the[] [statute] against the [police] officials." *Thompson*, 490 U.S. at 460, 465; cf. *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717 (1990) ("There is no presumption or general rule that for every duty imposed upon * * * the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions."). The language of Section 18-6-803.5 cannot be read to create a legitimate claim of entitlement to enforcement of the restraining order and the arrest of her husband.

To begin with, the arrest provisions of the statute concern a subject—executive enforcement decisions involving third parties—that traditionally has not been subject to judicial

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[1] See, *e.g.*, *People ex rel. Dunbar* v. *Gym of Am., Inc.*, 493 P.2d 660, 669 (Colo. 1972) (holding that attorney general has authority to "choose, depending upon the circumstances of the case" from various enforcement options); *Western Food Plan, Inc.* v. *District Court*, 598 P.2d 1038, 1041 (Colo. 1979); cf. *Staley* v. *Vaughn*, 17 P.2d 299, 301 (Colo. 1932) ("reasonable discretion should and must be used to effectively exercise the police power").

review. In determining whether a law creates a liberty or property interest, this Court has observed that decisions that "have not traditionally been the business of courts * * * are rarely, if ever, appropriate subjects for judicial review." *Dumschat*, 452 U.S. at 464; accord *Meachum* v. *Fano*, 427 U.S. 215, 225 (1976). A "decision not to prosecute or enforce, whether through civil or criminal process, is * * * generally committed to an agency's absolute discretion" and "the presumption is that judicial review is not available." *Heckler* v. *Chaney*, 470 U.S. 821, 831 (1985). Courts are "properly hesitant to examine" enforcement decisions because of the traditional executive discretion to decide how best to enforce the law given current resources and community needs. *Wayte*, 470 U.S. at 608; *Moog Indus.* v. *FTC*, 355 U.S. 411, 413 (1958) (per curiam). As the Court has noted in the context of prosecutorial discretion, "[t]his broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte*, 470 U.S. at 607; accord *Chaney*, 470 U.S. at 831. Moreover, because of "the special status of criminal prosecutions in our system," "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 619 (1973).

Claims challenging police arrest decisions arise most commonly in the context of tort actions arising from the failure to prevent crimes that caused injury. This Court has long noted the "lack of a substantive right to recover the damages resulting from failure of a government or its officers to keep the peace." *Turner* v. *United States*, 248 U.S. 354, 358 (1919) (Brandeis, J.); accord *South* v. *Maryland*, 59 U.S. (18 How.)



396, 403 (1856) (holding that sheriff was not liable for failure to prevent kidnapping). The "overwhelming current of decisions * * * reject[s] liability" for failure to provide police protection. W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 1050 (5th ed. 1984). Colorado appears to adhere to that general rule. *E.g.*, *Leake* v. *Cain*, 720 P.2d 152, 160-163 (Colo. 1986).[2]

Because of this background principle that private parties lack a legally cognizable interest in police enforcement, courts ordinarily recognize an entitlement to enforcement only when the legislature has clearly indicated that to be its intent. But far from clearly creating such an entitlement, two features of Section 18-6-803.5 suggest the opposite conclusion.

First, "the provision[] entirely lack[s] * * * 'rights-creating' language." *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 287 (2002). The enforcement provisions of Section 18-6-803.5 narrowly focus on the conduct of *police* with respect to the restrained party and do not even *mention* the protected party. Thus, the "focus [of those provisions] is two steps removed" (*Gonzaga Univ.* v. *Doe*, 536 U.S. at 287) from the protected party. The only provisions of the statute that direct police to take steps with respect to the protected party are limited to keeping that party informed of events.[3]

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[2] A handful of state courts have held that the holder of a protective order can recover in tort against police officers who negligently fail to prevent violence by the restrained party. See Caitlin E. Borgmann, Note, *Battered Women's Substantive Due Process Claims: Can Orders of Protection Deflect* DeShaney*?*, 65 N.Y.U. L. Rev. 1280, 1287 n.42 (1990) (collecting cases). Those cases are of little utility in determining liability under the much more stringent standards of the Due Process Clause and Section 1983. This Court has cautioned against making "the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul* v. *Davis*, 424 U.S. at 701; accord *DeShaney*, 489 U.S. at 202.

[3] Colo. Rev. Stat. § 18-6-803.5(3)(a) (2004) ("the protected person shall be provided with a copy" of the restraining order); *id.* § 18-6-803.5(3)(d)

The sole provision that discusses the holder of the restraining order in the context of protective services states merely that police are "authorized" to provide protection, not that they "shall" do so, see Section 18-6-803.5(6)(a), suggesting the legislature did not create any absolute entitlement to enforcement. See *Leake*, 720 P.2d at 162-163 (holding that statute providing that intoxicated persons "shall be taken into protective custody" did not "create a claim for relief against police officers who * * * release an intoxicated person" who later causes an accident); *Goebel*, 764 P.2d at 802 (holding that statutory language stating that legislature "shall appropriate" funds for services "do[es] not * * * create any rights in persons receiving services").

This Court has consistently held, in discussing whether a statute creates implied private rights of action or permits private enforcement under Section 1983, that statutory language "that focus[es] on the person regulated rather than the individuals protected create[s] 'no implication of an intent to confer rights on a particular class of persons.'" *Alexander* v. *Sandoval*, 532 U.S. 275, 289 (2001) (quoting *California* v. *Sierra Club*, 451 U.S. 287, 294 (1981)); accord *Gonzaga Univ.* v. *Doe*, 536 U.S. at 287; *Cannon* v. *University of Chicago*, 441 U.S. 677, 690-693 (1979). Similarly, the statutes and regulations that this Court has held created a claim of entitlement under the Due Process Clause consistently have

("[t]he law enforcement agency * * * shall make all reasonable efforts to contact the protected party upon the arrest of the restrained person"); *id.* § 18-6-803.5(3)(e) ("The agency shall give a copy of the agency's report * * * to the protected party."). See *Thompson*, 490 U.S. at 464 n.4 ("[T]he mandatory language requirement is not an invitation to courts to search regulations for *any* imperative that might be found. The search is for *relevant* mandatory language that expressly requires the decisionmaker to apply certain substantive predicates in determining whether [a claimant] may be deprived of the particular interest in question.").



directly addressed the protected party, rather than simply regulating a party whose actions affected them.[4]

This Court has interpreted mandatory statutory language to create a protected interest when it establishes predicates that appear designed "to protect a substantive interest to which the individual has a legitimate claim of entitlement." *Olim* v. *Wakinekona*, 461 U.S. 238, 250 (1983). But the Court has also noted that "[t]he State may choose to require procedures for reasons other than protection against substantive rights, * * * [and] in making that choice the State does not create an independent substantive right." *Id.* at 250-251. Because the arrest and enforcement provisions of the statute do not mention the holder of the restraining order, the statutory language directing the police to take certain actions in investigating an alleged violation of a restraining order is best construed as "a set of *procedures* that guides [police] in their efforts to prevent [domestic violence]." *Doe by Nelson* v. *Milwaukee County*, 903 F.2d 499,

[4] See, *e.g.*, *Board of Pardons* v. *Allen*, 482 U.S. 369, 376 (1987) (statute provided that "the [parole] board shall release on parole * * * any person confined in the Montana state prison" when criteria were met); *Hewitt*, 459 U.S. at 471 n.6 ("[i]f no behavior violation has occurred, the inmate must be released"); *Vitek* v. *Jones*, 445 U.S. 480, 483 n.1, 489-490 (1980) (statute provided that when a psychologist "finds that a person committed to the department [of corrections] suffers from a mental disease or defect" the prison may "arrange for his transfer" to another facility); *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1, 11 (1979) (statute provided that when parole board "considers the release of a committed offender * * * it shall order his release unless" certain conditions are present); *Goss* v. *Lopez*, 419 U.S. 565, 567, 573 (1975) (state law "provides for free education to all children" and that students cannot be suspended without notification and a hearing); *Bell* v. *Burson*, 402 U.S. 535, 536 n.1 (1971) (statute provided that State "shall suspend the [driver's] license * * * of the operator and owner of any motor vehicle" involved in an accident unless specified conditions were met); cf. *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 11 (1978) (case law provided that public utility was "obligated to provide service 'to all of the inhabitants of the city * * * without denial, except for good and sufficient cause'") (quoting *Farmer* v. *City of Nashville*, 156 S.W.189, 190 (Tenn. 1913)).

503 (7th Cir. 1990); accord *Doe by Fein* v. *District of Columbia*, 93 F.3d 861, 870 (D.C. Cir. 1996); cf. 1 *ABA Standards*, *supra*, § 1-4.5, commentary, at 1-125 ("As to third parties * * *, the full-enforcement statutes simply have no effect.").

Second, Section 18-6-803.5 does not attach any procedural rights to police enforcement of a restraining order or provide the holders of such orders any remedies against police. "The availability of such local-law remedies is evidence of the State's recognition of a protected interest." *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 11 (1978); *Goldberg* v. *Kelly*, 397 U.S. 254, 266 (1970).[5] Conversely, the absence of such protections from the Colorado statutory scheme is a telling indication that the State has not created an interest of sufficient stature to be denominated an "entitlement," and suggests that the statutes were meant to allow police officers to retain their traditional discretion (which, of course, does not require any specific procedures or third-party enforcement schemes). The procedures the court below sought to impose on police officers are novel and would almost convert police officers into limited-purpose magistrates.

Every other federal court of appeals to have addressed the question has held that comparable domestic-violence protection schemes do not create a protected liberty or property interest, even when a protective order has been issued or officials have made a preliminary determination of a need for protective services that triggers statutory obligations with respect to a specific individual.[6] The same conclusion is warranted here.

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[5] See *Hewitt*, 459 U.S. at 470 n.6 (hearing); *Goldberg*, 397 U.S. at 260 (hearing and judicial review); *Barry* v. *Barchi*, 443 U.S. 55, 62 n.9, 64 n.11 (1979) (hearing); *Memphis Light*, 436 U.S. at 9-10 (state law provided civil suit for damages); *Goss*, 419 U.S. at 567, 573 (hearing); *Bell*, 402 U.S. at 537-538 & n.3 (hearing and judicial review).

[6] See, *e.g.*, *Jones* v. *Union County, Tenn.*, 296 F.3d 417, 429 (6th Cir. 2002) (although state law "requir[ed] a sheriff to serve" order on restrained party, no liberty or property interest implicated where sheriff failed to do so); *Doe by Fein*, 93 F.3d at 868 & n.8 (holding that procedural due process claim based on statute requiring officials to commence an investigation of reports of neglect was "severely flawed"); *Doe by Nelson* v. *Milwaukee County*, 903 F.2d at 503 (holding that state law requiring officials to initiate an investigation within 24 hours of receiving report of abuse did not create a property interest); cf. *Doe* v. *Hennepin County*, 858 F.2d 1325, 1328 (8th Cir. 1988) (rejecting claim that use of "the word 'shall in the statute' which requires certain reporting and investigative procedures" "creates a constitutionally protected entitlement"), cert. denied, 490 U.S. 1108 (1989); *Archie* v. *City of Racine*, 847 F.2d 1211, 1217-1218 (7th Cir. 1988) (en banc), cert. denied, 489 U.S. 1065 (1989).



### c. *Recognizing A Property Interest In The Enforcement of Restraining Orders Would Disrupt Law Enforcement And Impose Unwarranted Liability*

The court of appeals' novel holding that the holders of restraining orders have a property interest in their enforcement will, if upheld, adversely affect the operations of law enforcement operations nationwide. Restraining orders are extremely common, and are not limited to domestic-relations cases. Colorado law provides for automatic imposition of a temporary restraining order in *every* divorce case, see Colo. Rev. Stat. § 14-10-107(4)(b)(I) (2003), and presumptively provides for a "mandatory restraining order" in every criminal case and juvenile delinquency case (which also restrains the juvenile's parents). *Id.* §§ 18-1-1001(1), 19-2-707(1). Officers' enforcement duties for those restraining orders are identical to those at issue here. See *id.* § 18-6-803.5(1.5)(a.5); § 18-1-1001(7); § 19-2-707(4). As noted by amici, 19 States have adopted statutes directing arrest when police have probable cause that restraining orders have been violated. See Br. of Int'l Mun. Lawyers Ass'n & Nat'l League of Cities in Supp. of Pet'r 5 (petition stage). In addition, many States and the federal government are subject to statutes that direct that officials "shall" perform specified tasks under cer-

tain circumstances.[7] Although the court of appeals limited its holding to cases in which both the restraining order and the statute purportedly imposed a duty to arrest, see Pet. App. 18a n.9, such cases will not be uncommon, and it is foreseeable that courts could subject governments to comparable duties when officers have cause to believe a violation of law has occurred, triggering statutory directives to investigate or take other action.

Upholding the Tenth Circuit's decision could disrupt law enforcement efforts by forcing officials to modify enforcement priorities to avoid personal liability for money damages. Although the Colorado legislature has classified violation of a restraining order as a fairly minor offense (it is ordinarily a class 2 misdemeanor, see Colo. Rev. Stat. § 18-6-803.5(2)(a) (2004)), the prospect of liability would require police to devote disproportionate resources to *every* alleged violation or attempted violation of a restraining order, however minor and nonviolent (including violations of restrictions on encumbering assets, see Pet. App. 89a), in *every*

[7] See, *e.g.*, 12 U.S.C. 1731b(f) (Secretary promptly "shall investigate" allegations and "shall order such violation, if found to exist, to cease forthwith"); 22 U.S.C. 4111(b) ("If a petition is filed with the Board * * * the Board shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing."); 29 U.S.C. 482(b) ("The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this subchapter has occurred and has not been remedied, he shall, within sixty days * * * , bring a civil action."); 31 U.S.C. 3730(a) ("The Attorney General diligently shall investigate a violation under section 3729."); 38 U.S.C. 4325(b) ("The inspector general shall investigate and resolve the allegation."); see also Cal. Gov't Code § 26601 (West 1988) ("The sheriff shall arrest and take before the nearest magistrate for examination all persons who attempt to commit or who have committed a public offense."); Conn. Gen. Stat. Ann. § 10-200 (West 2002) ("[t]he police in any town, city or borough * * * shall arrest all such children found anywhere beyond the proper control of their parents or guardians"); Mass. Ann. Laws ch. 56, § 57 (Law. Co-op. 2001) ("[p]olice officers * * * shall arrest without a warrant any person detected in the act of violating any provision of chapters fifty to fifty-six.").



case (including those entered as a matter of course in cases involving no history or risk of violence). Officers would be placed in the position of delaying response to more serious crimes or to public emergencies (such as riots or natural disasters) to apply the court of appeals' detailed four-part procedure to even nonviolent restraining-order violations because failure to do so would expose them to personal liability. This Court should "decline to place officers * * * in the untenable position of having to consider, often in a matter of seconds," *New York* v. *Quarles*, 467 U.S. 649, 657-658 (1984), whether to risk personal liability to pursue what they view to be a more pressing enforcement priority. That position is not made any easier by the prospect of Section 1983 liability if the officer errs in the other direction by arresting an individual without probable cause. Cf. *DeShaney*, 489 U.S. at 203 (noting that if the State had intervened too soon, it could have faced "charges based on the same Due Process Clause").

Rejecting respondent's claim would not, as the court of appeals concluded, render restraining orders "utterly valueless." Pet. App. 28a. When the restrained party's "behavior is not sufficiently serious to support criminal charges, an order ushers the victim into the legal system" and places clear and enforceable restrictions on the restrained party's conduct. See 106 Harv. L. Rev. at 1514. Even if police decline to pursue a violation of a restraining order, the protected party can initiate contempt proceedings against the restrained party or (under some circumstances) ask prosecutors to bring a contempt action. See Colo. Rev. Stat. § 18-6-803.5(7) (2004); *id.* § 14-4-105 (2003); Colo. R. Civ. P. 107(c). Moreover, in some States, a protected party can maintain a tort action against officers who fail to enforce a TRO, subject to whatever limitations state law imposes on suits against officials. Pursuing any of those courses permits the holder of a restraining order to enforce the order without

exposing municipal governments and officers to liability greater than that anticipated by the State legislature. By contrast, permitting recovery under the Due Process Clause through Section 1983 creates the possibility of liability far in excess of that available under state law, which, in the long term, may cause the jurisdiction to cut back on services (including emergency services) to make up budgetary shortfalls. Cf. *Archie* v. *City of Racine*, 847 F.2d 1211, 1218, 1223-1224 (7th Cir. 1988) (en banc) (Easterbrook, J.), cert. denied, 489 U.S. 1065 (1989). Thus, "absent a clear federal statutory or constitutional mandate, the development of state and municipal tort liability in this area is best left to state courts and legislatures." *Estate of Gilmore* v. *Buckley*, 787 F.2d 714, 722 (1st Cir.), cert. denied, 479 U.S. 882 (1986).

**B. Even Assuming That Respondent Had A Protected Interest In Police Enforcement Of The Restraining Order, The Procedures Employed Were Constitutionally Adequate**

Even if this Court were to recognize for the first time a property interest in police enforcement of criminal laws, the four-step procedure adopted by the court of appeals would far exceed the requirements of due process. Police would satisfy the requirements of due process when, as here, they permit the holder of the restraining order "to present evidence of a violation of the order and * * * to argue why an arrest is the proper response to the violation." Pet. App. 94a (Hartz, J., dissenting).

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972). To determine what procedures are warranted in a given situation, this Court generally considers the three factors outlined in *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976): 1) the private interest affected by the official action; 2) the risk of an erroneous deprivation of that interest through the procedures used, as



well as the likely value of additional safeguards; and 3) the government's interest, including the administrative burden that additional procedures would impose. Although "'the root requirement' of the Due Process Clause [is] 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest," *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Boddie* v. *Connecticut*, 501 U.S. 371, 379 (1971)), the Court has emphasized that the "'hearing' * * * need not be elaborate." *Id.* at 545. The Court has also emphasized the important role history and tradition play in determining what procedures are required, noting that when officials have followed "what 'has always been the law of the land, the case for administrative safeguards is significantly less compelling.'" *Ingraham* v. *Wright*, 430 U.S. 651, 679 (1977) (quoting *United States* v. *Barnett*, 376 U.S. 681, 692 (1964)).

As to the first *Mathews* factor, the weight to be given respondent's interest in police enforcement must be offset by two considerations. First, police enforcement is not the exclusive method of enforcing a restraining order; in non-emergencies, a protected party may commence contempt proceedings against the restrained party and in some circumtances may ask a prosecutor to do so. Colo. Rev. Stat. § 18-6-803.5(7) (2004); *id.* § 14-4-105 (2003); Pet. App. 91a; cf. *Mathews*, 424 U.S. at 343 (weighing availability of alternative income sources). Second, "in determining what process is due, account must be taken of 'the *length*' and '*finality* of the deprivation.'" *Gilbert* v. *Homar*, 520 U.S. 924, 932 (1997). An officer's denial of immediate enforcement generally is not conclusive of a protected party's rights. Police often make decisions about the timing of enforcement based on then-available resources and their assessment of the need for immediate action, and may monitor evolving situations so they can intervene promptly if circumstances become critical. As in this case, a party can return to police with more

information indicating that immediate enforcement is warranted in light of current circumstances. There is no indication that the interest asserted by respondent entails a right to enforcement on a specific timetable; indeed, the statute purportedly creating the property interest provides that police may forego immediate arrest and seek a warrant where immediate action "would be impractical." Colo. Rev. Stat. § 18-6-803.5(3)(b) (2004).

On the other side of the balance, the State has a significant interest in preserving flexibility and administrative simplicity by avoiding the imposition of rigid decisionmaking procedures. See *Mathews*, 424 U.S. at 348 (noting public interest "in conserving scarce fiscal and administrative resources"); *Dixon* v. *Love*, 431 U.S. 105, 114 (1977). The court of appeals' conclusion that its procedural requirements would only take "minutes to perform" (Pet. App. 41a) is both unduly optimistic and overlooks the costs in terms of the rigidity of the procedure and its administrability by laypersons frequently acting under significant time pressure. Cf. *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 347 (2001) (in Fourth Amendment context, noting "essential interest" in adopting "readily administrable rules" that are "clear and simple to be applied").

The final *Mathews* factor is the risk of erroneous deprivation and the likely value of any additional procedures. Although the officers clearly were mistaken about the risk of violence and need for immediate enforcement in this case, the "dictates of due process must be shaped by 'the risk of error inherent in the truthfinding process as applied to the generality of cases' rather than the 'rare exceptions.'" *Mackey* v. *Montrym*, 443 U.S. 1, 14 (1979). There has been no showing here that the usual process of informally receiving information from the holder of the restraining order was inherently faulty, or that the procedures adopted by the court of appeals would have brought new facts to the offi-



cers' attention. Although the procedures adopted by the court of appeals require police to undertake formal fact-finding about the existence of a restraining order and of probable cause that there has been a violation, "neither [of those facts] has ever been disputed" in this case, Pet. App. 64a (McConnell, J., dissenting). Nor does it appear that those facts would often be in dispute, because the order holder is likely to be the principal or only witness available to police at the time an initial enforcement decision is made. A police decision whether to seek immediate arrest or to wait upon further developments generally will not turn on facts that a protected party could prove in more formal proceedings, but instead likely will depend on matters within the exclusive knowledge of police (*e.g.*, competing demands on resources), or upon police assessment of the seriousness of the violation and the risk of violence. Under such circumstances, there is little to be gained from more formal procedures. 106 Harv. L. Rev. at 1564 & n.92; see generally *Mackey*, 443 U.S. at 14 (holding that predeprivation hearing was unnecessary where "there will rarely be any genuine dispute as to the historical facts providing cause for a suspension").

Under the circumstances, informal oral consultation between the holder of a restraining order and police would be sufficient and would provide "[t]he fundamental requisite of due process of law": "the opportunity to be heard." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). See, *e.g.*, *Memphis Light*, 436 U.S. at 16 (due process satisfied by "the provision of an opportunity for the presentation to a designated employee of a customer's complaint" before termination of utility service). There is simply no historical precedent for affording citizens formal procedures before police decline to take enforcement action against a third party. In *United States* v. *Watson*, 423 U.S. 411 (1976), this Court rejected the argument that agents should be prohibited from making warrantless arrests based on probable

cause when there was time to obtain a warrant. Although the Court observed that "an advance determination of probable cause by a magistrate would be desirable," because officers might "improperly assess the facts and thus unconstitutionally deprive an individual of liberty," the Court "declined to depart from the traditional rule by which the officer's perception is subjected to judicial scrutiny only after the fact." *Ingraham*, 430 U.S. at 679-680. "There is no more reason to depart from tradition and require advance procedural safeguards for intrusions on personal security to which the Fourth Amendment does not apply." *Id.* at 680.

* * * * *

Although the officers' failure to act promptly in this case may have caused respondent to suffer a grievous and tragic loss, it did not deprive her of any interest protected by the Due Process Clause. The decision of what remedy is to be afforded her "is best left to state courts and legislatures," *Estate of Gilmore*, 787 F.2d at 722, rather than to have a remedy "thrust upon the[] [State] by this Court's expansion of the Due Process Clause of the Fourteenth Amendment." *DeShaney*, 489 U.S. at 203.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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## APPENDIX

1. Colorado Revised Statutes § 14-10-108 (2004) provides, in relevant part:

**Temporary order in a dissolution case**

(1) In a proceeding for dissolution of marriage, legal separation, the allocation of parental responsibilities, or declaration of invalidity of marriage or a proceeding for disposition of property, maintenance, or support following dissolution of the marriage, either party may move for temporary payment of debts, use of property, maintenance, parental responsibilities, support of a child of the marriage entitled to support, or payment of attorney fees. The motion may be supported by an affidavit setting forth the factual basis for the motion and the amounts requested.

(1.5) The court may consider the allocation of parental responsibilities in accordance with the best interests of the child, with particular reference to the factors specified in section 14-10-124 (1.5).

(2) As a part of a motion for such temporary orders or by an independent motion accompanied by an affidavit, either party may request the court to issue a temporary injunction:

(a) Restraining any party from transferring, encumbering, concealing, or in any way disposing of any property, except in the usual course of business or for the necessities of life, and, if so restrained, requiring him to notify the moving party of any proposed extraordinary expenditures and to account to the court for all extraordinary expenditures made after the order is issued;

(b) Enjoining a party from molesting or disturbing the peace of the other party or of any child;

(c) Excluding a party from the family home or from the home of the other party upon a showing that physical or emotional harm would otherwise result.

* * * * *

(5) A temporary order or temporary injunction:

(a) Does not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearings in the proceeding;

(b) May be revoked or modified prior to final decree on a showing by affidavit of the facts necessary to revocation or modification of a final decree under section 14-10-122; and

(c) Terminates when the final decree is entered, unless continued by the court for good cause to a date certain, or when the petition for dissolution or legal separation is voluntarily dismissed.

* * * * *

2. Colorado Revised Statutes § 14-4-105 (2003) provides:

**Violations of orders**

A person failing to comply with any order of the court issued pursuant to this article shall be found in contempt of court and, in addition, may be punished as provided in section 18-6-803.5, C.R.S.



3. Colorado Revised Statutes § 18-6-803.5 (2004) provides:

**Crime of violation of a protection order—penalty —peace officers' duties**

(1) A person commits the crime of violation of a protection order if such person contacts, harasses, injures, intimidates, molests, threatens, or touches any protected person or enters or remains on premises or comes within a specified distance of a protected person or premises or violates any other provision of a protection order to protect the protected person from imminent danger to life or health, and such conduct is prohibited by a protection order, after such person has been personally served with any such order or otherwise has acquired from the court actual knowledge of the contents of any such order.

(1.5) As used in this section:

(a) "Protected person" means the person or persons identified in the protection order as the person or persons for whose benefit the protection order was issued.

(a.5)(I) "Protection order" means any order that prohibits the restrained person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any protected person, or from entering or remaining on premises, or from coming within a specified distance of a protected person or premises or any other provision to protect the protected person from imminent danger to life or health, that is issued by a court of this state or a municipal court, and that is issued pursuant to:

(A) Article 14 of title 13, C.R.S., sections 18-1-1001, section 19-2-707, C.R.S., section 19-4-11, C.R.S., or rule 365 of the Colorado rules of county court civil procedure;

(B) Sections 14-4-101 to 14-4-105, C.R.S., section 14-10-107, C.R.S., section 14-10-108, C.R.S., or section 19-3-316, C.R.S. as those sections existed prior to July 1, 2004;

(C) An order issued as part of the proceedings concerning a criminal municipal ordinance violation; or

(D) Any other order of a court that prohibits a person from contacting, harassing, injuring, intimidating, molesting, threatening, or touching any person, or from entering or remaining on premises, or from coming within a specified distance of a protected person or premises.

(II) For purposes of this section only, "protection order" includes any order that amends, modifies, supplements, or supersedes the initial protection order. "Protection order" also includes any restraining order entered prior to July 1, 2003, and any foreign protection order as defined in section 13-14-104, C.R.S.

(b) "Registry" means the computerized information system created in section 18-6-803.7 or the national crime information center created pursuant to 28 U.S.C. sec. 534

(c) "Restrained person" means the person identified in the order as the person prohibited from doing the specified act or acts.

* * * * *

(2)(a) Violation of a protection order is a class 2 misde meanor; except that, if the restrained person has previously been convicted of violating this section or a former version of this section or an analogous municipal ordinance, or if the protection order is issued pursuant to section 18-1-1001, the violation is a class 1 misdemeanor.

* * * * *



(3)(a) Whenever a protection order is issued, the protected person shall be provided with a copy of such order. A peace officer shall use every reasonable means to enforce a protection order.

(b) A peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that:

(I) The restrained person has violated or attempted to violate any provision of a protection order; and

(II) The restrained person has been properly served with a copy of the protection order or the restrained person has received actual notice of the existence and substance of such order.

(c) In making the probable cause determination described in paragraph (b) of this subsection (3), a peace officer shall assume that the information received from the registry is accurate. A peace officer shall enforce a valid protection order whether or not there is a record of the protection order in the registry.

(d) The arrest and detention of a restrained person is governed by applicable constitutional and applicable state rules of criminal procedure. The arrested person shall be removed from the scene of the arrest and shall be taken to the peace officer's station for booking, whereupon the arrested person may be held or released in accordance with the adopted bonding schedules for the jurisdiction in which the arrest is made. The law enforcement agency or any other locally designated agency shall make all reasonable efforts to contact the protected party upon the arrest of the restrained person. The prosecuting attorney shall present any available arrest affidavits and the criminal history of the

restrained person to the court at the time of the first appearance of the restrained person before the court.

(e) The arresting agency arresting the restrained person shall forward to the issuing court a copy of such agency's report, a list of witnesses to the violation, and, if applicable, a list of any charges filed or requested against the restrained person. The agency shall give a copy of the agency's report, witness list, and charging list to the protected party. The agency shall delete the address and telephone number of a witness from the list sent to the court upon request of such witness, and such address and telephone number shall not thereafter be made available to any person, except law enforcement officials and the prosecuting agency, without order of the court.

(4) If a restrained person is on bond in connection with a violation or attempted violation of a protection order in this or any other state and is subsequently arrested for violating or attempting to violate a protection order, the arresting agency shall notify the prosecuting attorney who shall file a motion with the court which issued the prior bond for the revocation of the bond and for the issuance of a warrant for the arrest of the restrained person if such court is satisfied that probable cause exists to believe that a violation of the protection order issued by the court has occurred.

(5) A peace officer arresting a person for violating a protection order or otherwise enforcing a protection order shall not be held criminally or civilly liable for such arrest or enforcement unless the peace officer acts in bad faith and with malice or does not act in compliance with rules adopted by the Colorado supreme court.

(6)(a) A peace officer is authorized to use every reasonable means to protect the alleged victim or the alleged



victim's children to prevent further violence. Such peace officer may transport, or obtain transportation for, the alleged victim to shelter. Upon the request of the protected person, the peace officer may also transport the minor child of the protected person, who is not an emancipated minor, to the same shelter if such shelter is willing to accept the child, whether or not there is a custody order or an order allocating parental responsibilities with respect to such child or an order for the care and control of the child and whether or not the other parent objects. A peace officer who transports a minor child over the objection of the other parent shall not be held liable for any damages that may result from interference with the custody, parental responsibilities, care, and control of or access to a minor child in complying with this subsection (6).

* * * * *

(7) The protection order shall contain in capital letters and bold print a notice informing the protected person that such protected person may either initiate contempt proceedings against the restrained person if the order is issued in a civil action or request the prosecuting attorney to initiate contempt proceedings if the order is issued in a criminal action.

(8) A protection order issued in the state of Colorado shall contain a statement that:

(a) The order or injunction shall be accorded full faith and credit and be enforced in every civil or criminal court of the United States, another state, an Indian tribe, or a United States territory pursuant to 18 U.S.C. sec. 2265;

(b) The issuing court had jurisdiction over the parties and subject matter; and

(c) The defendant was given reasonable notice and opportunity to be heard.